Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IN THE MATTER OF:

MOUNT CALVARY BAPTIST CHURCH
also known as
MOUNT CALVARY CHURCH AND SCHOOL,

Debtor.

CHURCH MUTUAL INSURANCE COMPANY,

Petitioner,

v.

MOUNT CALVARY BAPTIST CHURCH
also known as MOUNT CALVARY CHURCH AND SCHOOL and SEAWAY NATIONAL BANK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit's review and reversal of the District Court's findings of fact violated the standards set forth in Rule 52(a) of the Federal Rules of Civil Procedure and those standards of review articulated by this Court?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Church Mutual Insurance Company ("Church Mutual"), and Respondents, Mount Calvary Baptist Church, also known as Mount Calvary Church and School ("Mt. Calvary"), and Seaway National Bank ("Seaway").

Pursuant to Supreme Court rules 14.1(b) and 29.1, Petitioner states that Petitioner has neither a parent corporation, nor any non-wholly-owned subsidiary.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, dated November 13, 1995, is reported at 70 F.3d 51, and is reproduced at pages 1-10 of the Appendix to this Petition ("Pet.App."). The opinion of the United States District Court for the Northern District of Illinois is reported at 172 Bankr. 880, and is reproduced at Pet. App. 11-26. The opinion of the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, is reported at 162 Bankr. 181, and is reproduced at Pet. App. 27-50.

The order of the United States Court of Appeals for the Seventh Circuit denying rehearing and denying rehearing *en banc*, dated January 2, 1996, is not yet reported and is reproduced at Pet. App. 52-53.

JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1995. Pet. App. 10. The Court of Appeals denied a timely Petition for Rehearing on January 2, 1996. Pet. App. 52-53. On March 21, 1996, Justice Stevens granted Petitioner an enlargement of time to file this Petition for Writ of Certiorari until May 31, 1996. Pet. App. 54-55.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This Petition involves Rule 52(a) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Petitioner seeks review of a decision of the United States Court of Appeals for the Seventh Circuit. At issue is the appellate court's proper role in reviewing a District Court's findings of fact. In this case, the Seventh Circuit paid lip service to this Court's rulings on the "clearly erroneous" standard of review while ignoring the substance of Rule 52(a) and this Court's interpretation of that Rule. Under the guise of reviewing questions of law, the Seventh Circuit improperly reviewed findings of fact *de novo* and reversed the District Court's findings of fact without analyzing whether the District Court's findings of facts were clearly erroneous.

The Seventh Circuit candidly admitted that it disagreed only with the result below and, in the process, changed the dispositive facts to reach a desired result. By ruling as it did, the Seventh Circuit ignored established standards of review and ran roughshod over Church Mutual's due process rights. The District and Circuit Courts could benefit from this Court's guidance on the proper role of a reviewing court.

One rule is clear: deference is afforded to a District Court's findings of fact. A contrary rule would unnecessarily expand the role of the Circuit Courts and allow those courts of review an unfettered license to substitute their findings of fact for those of the District Court. The Seventh Circuit unreasonably and improperly expanded its role, and should be reversed. The facts and procedures developed below are instructive.

On September 11, 1989, an arson fire damaged the building and contents of the Mt. Calvary Baptist Church on Chicago's south side. One week later, Mt. Calvary

filed for bankruptcy protection in the United States Bankruptcy Court for the Northern District of Illinois. In response to Mt. Calvary's insurance claim, Church Mutual filed a declaratory judgment action in the United States District Court for the Northern District of Illinois seeking a judicial determination that the multi-peril insurance policy issued to Mt. Calvary had been canceled prior to the fire for non-payment of the premium. That policy named Mt. Calvary as the insured and Mt. Calvary's mortgage lender, Seaway, as an additional insured. The complaint was later referred to the United States Bankruptcy Court pursuant to 28 U.S.C. §157(a).

On September 14, 15 and 17, 1993, a trial was held before Bankruptcy Judge (now District Court Judge) David H. Coar. Judge Coar issued Proposed Findings of Fact and Conclusions of Law ("Proposed Findings") on December 29, 1993. Judge Coar found that Church Mutual had properly canceled the policy before the fire for non-payment of premium and thereafter made a written offer to Mt. Calvary to reinstate the policy. Pet. App. 29-31 and 35-44. Church Mutual's written offer to reinstate required payment of a precise amount to be paid by money order or cashier's check. Because Mt. Calvary responded to Church Mutual's offer with a non-conforming personal check in a different amount, Judge Coar also determined that the tender of the personal check constituted a counter-offer which Church Mutual accepted when the check was cashed. *Id.* Judge Coar's factual findings of counteroffer and subsequent acceptance were dispositive and the Proposed Findings were forwarded to the District Court for entry. Pursuant to Bankruptcy rule 9033(b), Church Mutual filed timely objections to Judge Coar's Proposed Findings with the District Court for the Northern District of Illinois.

Inasmuch as the declaratory judgment action was a "non-core" proceeding in the Bankruptcy Court, the District Court conducted its review of the "Proposed Findings" of fact *de novo*. Bankruptcy Rule 9033(b). Following a *de novo* review of the facts, Judge Williams of the District Court adopted all of Judge Coar's findings of fact except one. Judge Williams specifically rejected Judge Coar's finding of fact that Church Mutual had accepted Mt. Calvary's counteroffer by the act of cashing the tendered personal check. Judge Williams found that:

> Church Mutual took several other steps coincident with its cashing of the (personal) check which clearly indicated its intention to reject any Mt. Calvary counteroffer.

Pet. App. 23. Judge Williams also found, as fact, that Mt. Calvary "perceived" at least one of these "steps" (a July 18, 1989 letter to Mt. Calvary) as a rejection of Mt. Calvary's counteroffer. Pet. App. 24. The District Court entered final judgment in favor of Church Mutual against Mt. Calvary and Seaway, ruling that the insurance policy was not in force at the time of the fire. Pet. App. 26.

Thereafter, Mt. Calvary and Seaway appealed the District Court's judgment to the Seventh Circuit. There, the Seventh Circuit "disagreed" with Judge Willliams' findings of fact and opined that Church Mutual's intent to reject the counteroffer was not clear. Pet. App. 4 and 8. Without *ever* finding that the District Court's facts were "clearly erroneous", the Seventh Circuit substituted its own findings of fact for those of the District Court and reversed the District Court. Pet. App. 9-10.

REASONS FOR GRANTING THE WRIT

Petitioner recognizes that the Seventh Circuit's analysis of Illinois law, whether right or wrong, is largely irrelevant to this Court's review of the merits of this Petition for a Writ of Certiorari. The state law issues considered by the Seventh Circuit, while wrongly decided, are probably not of such significance as to warrant review by this Court. This case warrants review because of the sleight-of-hand method employed by the Seventh Circuit in reversing the District Court's decision in order to reach a desired result: insurance coverage for a down and out church. In substituting its findings of fact for the District Court's findings, which findings were never determined to be clearly erroneous, the Seventh Circuit ignored this Court's ruling in *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985) and its own prior rulings, as discussed below. By characterizing the District Court's findings of fact as "conclusions of law" (See Pet. App. 4), the Seventh Circuit sidestepped the "clearly erroneous" standard and trampled on the due process rights of Church Mutual.

The end does not justify the means. It is wholly improper for a reviewing court to substitute its factual findings *de novo* for those of the District Court, regardless of motive. The cavalier method utilized by the Seventh Circuit to substitute its facts for those of the District Court presents grounds for this Court's review. Supreme Court Rule 10.

In this case (a non-core Bankruptcy proceeding), the District Court properly substituted its judgment for that of the Bankruptcy Court. Following a mandatory *de novo* review, Judge Williams adopted all but one of the Bankruptcy Court's findings of fact and further determined, as

a matter of fact, that no one could reasonably conclude that Church Mutual accepted Mount Calvary's counter-offer. Pet. App. 23. This finding of fact disposed of the case. Since no "contract to reinstate" the canceled policy was ever found, no insurance was in force at the time of the fire.

It is well-established that mixed questions of fact and law are reviewed under the clearly erroneous standard. *Elberg v. Mobil Oil Corp.*, 967 F.2d 1146, 1149 (7th Cir. 1992); *Mucha v. King*, 792 F 2d 602, 605 (7th Cir. 1986) ["Rule 52(a) . . . assigns to the trial judge the responsibility of determining not only the historical events that are relevant to how the case should be decided but also the legal significance of those events. . . . Facts . . . which are found by applying a legal standard to a descriptive or historical narrative are governed by the clearly erroneous rule".] When the District Court's findings relate to the intent of a party to contract, or a party's expression of its intent to contract, the reviewing court should not disturb the findings unless those findings are clearly erroneous. *A.L. Cahn & Sons, Inc. v. Gellman Mfg. Co.*, 286 F.2d 871 (7th Cir. 1961); *Healy v. Rich Prods. Corp.*, 981 F.2d 68, (2d Cir. 1992) *remanded*, 1994 WL 228605 (W.D.N.Y. May 6, 1994); *Ginsu Prods., Inc. v. Dart Indus., Inc.*, 786 F.2d 260, 265 (7th Cir. 1986). In a trial involving the existence of a contract, it is for the District Court to resolve any conflicts in the evidence and the trial court's resolution of those conflicts in the evidence and the trial court's resolution of those conflicts should not be disturbed unless clearly erroneous. *Weissman v. Cole Prods. Corp.*, 269 F.2d 340 (7th Cir. 1959).

While it is often said that contract interpretation is a question of law which can be reviewed *de novo* on appeal,

this rule applies only when the contract as a whole is coherent and ambiguities can be resolved without looking beyond the four corners of the written contract. When a court must look to extrinsic evidence, questions of contract interpretation and questions of contract formation are questions of fact. *Carpenters Amended & Restated Health Benefits Fund v. Holleman Construction Co.*, 751 F.2d 763 (5th Cir. 1985). Where the District Court in a contract case has made a factual finding as to intent, the Seventh Circuit has said that it "will not ransack the record searching for mistakes". *Ginsu Prods.*, 786 F.2d at 266. Where the appellant fails to "meet its burden" of establishing clear error under Rule 52(a)'s "stiff standard of review", then the District Court's ruling must be affirmed. *Ginsu Prods.*, 786 F.2d at 264.

In reversing the District Court, and in clear disregard of Judge William's findings of fact (much less deference), the Seventh Circuit candidly admitted that it disagreed with the most significant of Judge William's findings of fact without ever making a "clearly erroneous" finding. The Seventh Circuit simply substituted its findings of fact for those of the District Court. Specifically:

1. although Judge William's found, and Mt. Calvary conceded, that the mere act of cashing Mt. Calvary's check was not an acceptance of Mt. Calvary's counteroffer, the Seventh Circuit found that Church Mutual had accepted the counteroffer by cashing Mt. Calvary's check. See Pet. App. 23-24 and 8-9;
2. although Judge Williams found, and Mt. Calvary argued at trial, that Mr. Barron's tender of the Church's check was a counteroffer (Pet. App. 21-24), the Seventh Circuit found that Mr. Barron "did not intend to make a counteroffer". Pet. App. 9. According to the Seventh Circuit, the tender was just

a "routine payment of a past due premium," and the church was "just paying bills". *Id.*;

3. although Judge Williams found that Mt. Calvary's tender of a personal check was not an acceptance of Church Mutual's original offer to reinstate (Pet. App. 23-24), the Seventh Circuit found that the Church's personal check was "as good as gold" and that its tender bound Church Mutual. Pet. App. 9;
4. although Judge Williams found that Church Mutual's July 18, 1989 letter to Mt. Calvary was a clear indication of its intention to reject Mt. Calvary's counteroffer (Pet. App. 24), the Seventh Circuit found that the letter was *not* clear. Pet. App. 8;
5. finally, in response to Judge William's finding that the intention to reject the counteroffer was clear and that Mt. Calvary could not reasonably have interpreted Church Mutual's conduct as acceptance of its counteroffer (Pet. App. 23-24), the Seventh Circuit said simply: "we disagree". Pet. App. 8.

Without any authority, the Seventh Circuit did exactly what the District Court had done with proper authority; that is, substituted its own facts for the facts found by the court below.

The Seventh Circuit recognized that *Anderson v. City of Bessemer* was controlling. See Pet. App. 4. In accordance with *Anderson*:

> The standard governing appellate review of a district court's finding [of fact] is that set forth in Federal Rule of Civil Procedure 52(a): "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

Anderson, 470 U.S. at 573.

In *Anderson*, this Court recognized that "a finding of intentional discrimination is a finding of fact". *Id. See also, Pullman-Standard v. Swint*, 456 U.S. 273 (1982). As noted above, the Seventh Circuit has long held that the elements of contract formation are questions of fact to be determined by the finder of fact.

Under the Seventh Circuit's unique interpretation of *Anderson*, however, no deference is accorded the District Court's findings of fact in those situations where the Circuit Court disagrees with the final result. According to the Seventh Circuit, if a finding of fact has legal significance (*e.g.*, it disposes of the case) then the reviewing court need not review the finding of fact for clear error; it may simply change the fact. Under the Seventh Circuit's rule in this case, an appellate court will always be free to substitute its judgment for that of the trier of fact.

The District Court's finding that Church Mutual did not accept Mt. Calvary's counteroffer is a factual determination. Just because it is dispositive, that finding of fact is not transformed into a conclusion of law. According to this Court, the "clearly erroneous" standard:

> plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court over steps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.

Anderson, 470 U.S. at 573; *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). If the District Court's "account of evidence is plausible in light of the record viewed in its entirely, the Court of Appeals may not reverse it even though convinced that if it had

been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S. at 574. Where, as may be the case here, "there are two permissible views of the evidence, the fact finder's choice between them *cannot be clearly erroneous*." (emphasis added) *Anderson*, 470 U.S. at 574, citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); and *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982). The rationale for the rule limiting judicial review of findings of fact is explained in *Anderson*. Suffice to say, the rule seeks finality, judicial efficiency and fairness as its purpose. Indeed, the trial on the merits should be the main event, and not a "tryout on the road." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1971).

Just as the District Court may not shield its findings from careful appellate review by simply characterizing those findings as based on the credibility of the witnesses (*See United States v. United States Gypsum Co.*, 333 U.S. 364, 396 (1948)), the Seventh Circuit should not be able to substitute its factual determinations for those of the District Court by simply suggesting that the legal result is not justified by the facts it finds important, especially when contrary, dispositive facts have been found by the District Court which are not "clearly erroneous". In this case, the District Court determined, as fact, that there was no acceptance of Mt. Calvary's counteroffer, and applying Illinois law, held in favor of Church Mutual. While the Seventh Circuit may have disliked the outcome of the case below, its authority to change the lower court's findings of fact is severely limited by Rule 52(a) and the pronouncements of this Court. Factual findings of the District Court cannot be changed unless they are clearly erroneous.

CONCLUSION

All findings of fact have legal implications. As a practical matter, some facts are dispositive of legal issues. While the District Court's findings of facts may dispose of a legal issue, the dispositive nature of a finding of fact does not transform that finding into a conclusion of law. This is the principle that the Seventh Circuit overlooked in its zeal to find insurance coverage for Mt. Calvary. The Seventh Circuit ignored the requirements of Rule 52(a), it ignored this Court's articulation of Rule 52(a) and it ignored its own prior rulings that questions of contract formation are questions of fact for the finder of fact.

The Petition for Writ of Certiorari should be granted, and the Writ should issue.

Respectfully submitted

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APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 94-3521 and 94-3574

IN THE MATTER OF

MOUNT CALVARY BAPTIST CHURCH also known as MOUNT CALVARY BAPTIST CHURCH & SCHOOL,

Debtor.

CHURCH MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee,

v.

MOUNT CALVARY BAPTIST CHURCH also known as MOUNT CALVARY BAPTIST CHURCH & SCHOOL and SEAWAY NATIONAL BANK,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94-C-673—**Ann Claire Williams,** *Judge.*

ARGUED SEPTEMBER 8, 1995—DECIDED NOVEMBER 13, 1995

Before BAUER, COFFEY, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* This case boils down to one question: Should the Church Mutual Insurance Company be allowed to cash a check intended to cover premiums due on three specifically identified insurance policies and apply the proceeds not to the policies but to other debts

of the insured? The bankruptcy court said no; the district court, on review, said yes. We think the bankruptcy court got the right answer so we reverse the decision of the district court and remand for the entry of judgment in favor of Mount Calvary Baptist Church and its mortgagee, the Seaway National Bank.

A fire destroyed the Mount Calvary Baptist Church on September 11, 1989. A week later the church filed for relief under Chapter 11 of the United States Bankruptcy Code. Two months later, in November of 1989, the Church Mutual Insurance Company, which had been providing several types of insurance to Mount Calvary, filed this case in the United States District Court for the Northern District of Illinois, seeking a declaratory judgment that a multi-peril insurance policy previously issued to the church was not in effect when the blaze ignited.

Church Mutual's suit for declaratory relief was referred to the bankruptcy court. Bankruptcy Judge David H. Coar[1] conducted a trial in the case during September of 1993. In a decision entered on December 29, 1993, Judge Coar concluded that the multi-peril policy was in force at the time of the fire. The matter was then ready to move to the district court for further proceedings.

Church Mutual's declaratory judgment action was, the parties agreed, referred to the bankruptcy court pursuant to 28 U.S.C. § 157(a). The parties seemed to have disagreed, however, as to whether Judge Coar's decision was made pursuant to 28 U.S.C. § 157(b)(1), in which case he was issuing a final order, or whether his decision was in the nature of proposed findings of fact and conclusions of law, the scheme announced in § 157(c)(1).

In the former case, a district court's review of a decision by a bankruptcy judge would have been pursuant to Bankruptcy Rule 8013. That rule provides in part that

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[1] Judge Coar is now a United States district judge for the Northern District of Illinois.

upon appeal to the district court, the "[f]indings of fact [of the bankruptcy court], whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . ." In the latter case—if the decision was made pursuant to § 157(c)(1)—review would be under Bankruptcy Rule 9033. Rule 9033 provides that the bankruptcy judge makes "proposed findings of fact and conclusions of law" and that the district judge then makes a "de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made . . . ."

How was Judge Coar proceeding? His decision was framed as "proposed findings of fact and conclusions of law"—a point for Church Mutual—but his conclusion read more like a final order—a counterpoint for Mount Calvary. Mount Calvary, the winner in the bankruptcy court, wanted Judge Coar's findings of fact upheld unless they were clearly erroneous. Church Mutual thought otherwise; de novo review in the district court was required.

To determine just how Judge Coar was proceeding, Church Mutual filed a motion under 28 U.S.C. § 157(b)(3) seeking clarification in the bankruptcy court. Judge Coar revisited the matter in a short order issued on January 13, 1994. In his encore, Judge Coar quickly got to the core of the matter, noting that the proceeding before him was non-core and that further proceedings in the district court would be under Bankruptcy Rule 9033.

After the clarification order was issued, the case moved to the district court, where objections by Church Mutual to Judge Coar's proposed findings were entertained. The district court, proceeding de novo under rule 9033, adopted Church Mutual's view of the case, holding that the multiperil policy was not in effect at the time of the fire. This appeal by Mount Calvary followed.

On appeal to this court, Mount Calvary again argues that the district court was obligated to review Judge Coar's findings under a clearly erroneous standard. Mount

Calvary even adds a new wrinkle to its argument, contending that Church Mutual consented to the bankruptcy court's consideration of the case under § 157(c)(2). Consent under that section would, like a proceeding under § 157(b)(1), obligate the district court to review the bankruptcy court findings under a deferential "clearly erroneous" standard.

We agree with Church Mutual and the judges below on the standard of review. Judge Coar acted under § 157(c)(1). Church Mutual, by mere silence, did not consent to proceed in the bankruptcy court under § 157(c)(2). *See Home Insurance Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746 (7th Cir. 1989). The district court properly reviewed the case de novo, and its findings of fact can be disturbed only if they are clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. 564 (1985).

It does not inexorably follow, however, that Church Mutual gets the brass ring at the end of the ride. It doesn't, for we review the district court's conclusions of law de novo. *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081 (7th Cir. 1994). And in this case, it is a conclusion of law with which we disagree.

For several years prior to 1989, Church Mutual and Mount Calvary, a Baptist church and school on Chicago's south side, did business together. Church Mutual issued at least six policies of insurance to Mount Calvary over the years. The particular policy at issue in this case is a multi-peril contract of insurance—number 061970-02-49653—issued to Mount Calvary on December 7, 1987. Of the policies issued by Church Mutual, Mount Calvary considered the multi-peril to be the most important. The Seaway National Bank is named as the mortgagee under the policy.

Two months before the fire, on July 5, 1989, Church Mutual mailed notices of cancellation to Mount Calvary on its business automobile and workers compensation policies. The cancellation notices were based on Mount Calvary's failure to pay premiums on those policies in a

timely manner. On July 10, 1989, Church Mutual sent a similar cancellation notice to Mount Calvary on the multi-peril policy. The cancellation notices provided that the business automobile policy would be cancelled on July 17, 1989; the workers compensation policy on July 17, 1989; and the multi-peril policy on July 22, 1989. Form letters which accompanied the notices with the salutation "Dear Policyholder" gave the amount of the premium past due and provided that payment must be received within 10 days from the date of the notice or each policy would be cancelled. The letters from Church Mutual also contained the following statement, with the precise sum due inserted in bold type:

> Please send us a BANK MONEY ORDER or CASHIER'S CHECK for $_____ and keep your protection uninterrupted. Uncertified personal checks will *not* be accepted.

The letters indicated that the amounts due were $147.25 for the automobile policy; $932.50 for the workers compensation policy; and $292.75 for the multi-peril policy. The three sums total $1,372.50.

At the time the cancellation notices were received, Willie Barron was the financial secretary of Mount Calvary. It was his job to pay the bills. On July 13, 1989, just three days after Church Mutual sent the cancellation notice on the multi-peril policy and nine days before the cancellation was to become effective, Mr. Barron wrote a check on Mount Calvary's regular business checking account to Church Mutual for the exact sum of the past due premiums on the three identified policies. The check totaled $1,372.50. He placed the check and the three cancellation notices—which identified each policy by its unique number—in an envelope and mailed them to Church Mutual. Church Mutual received the payment on July 18, 1989, and the check was deposited to Church Mutual's bank account that day. The check cleared without a hitch.

During the relevant time, Sharon Kleinschmidt was the billing accounts receivable supervisor for Church Mutual. She maintained at trial that she did not see the notices

which Mr. Barron had included with the payment, a claim rejected by both the bankruptcy court and the district court. Ms. Kleinschmidt made a decision to apply the $1,372.50 to cover amounts Mount Calvary owed Church Mutual for "earned premiums due" rather than on the three specific policies involved in the July cancellation notices. In her July 18, 1989, letter of explanation, she wrote:

> Mount Calvary Baptist Church and School
> 1257 West 111th Street
> Chicago, IL 60643
>
> RE: Commercial Fire Policy No. 061970-13-564633
>
> The policy indicated above was cancelled because the premium was not paid on time. Your payment which we just received arrived too late for us to reinstate this cancelled policy.
>
> We are cashing your check and deducting that amount from the earned premium due on the above captioned policy, as well as any premiums due from other policies that you may have with our company.
>
> | | | |
> |---|---|---|
> | $ | 285.00 | Earned premium due on the above captioned policy |
> | + | 292.75 | Premium due on multi-peril policy No. 061970-02-496353 |
> | + | 2,610.75 | Premium due on workers' compensation policy No. 061970-07-500295 |
> | + | 932.50 | Premium due on workers' compensation policy No. 061970-07-557465 |
> | + | 2,122.00 | Premium due on automobile policy No. 061970-09-502786 |
> | + | 147.25 | Premium due on automobile policy No. 06190-09-557465 |
> | − | 1,372.50 | Your check amount |
> | $ | 5,017.75 | Balance due on account immediately |
>
> Should you have any questions on the above, please feel free to contact me.

When he received the letter, Mr. Barron called Ms. Kleinschmidt to protest the application of the payment. She told him nothing could be done to change the situation. During August, Mr. Barron made additional telephone calls to protest the application of the payment. His attempts were futile: he was told that the policies were cancelled, including the multi-peril policy at issue here.

The primary reason Mr. Barron did not prevail was that Church Mutual had an internal procedure under which payments received without direction on how they should be applied were applied first to unpaid earned premiums. Ms. Kleinschmidt said that because she did not see the cancellation notices, she followed the company procedure. She followed the procedure, in fact, even though it should have been clear to her that the amount tendered was the precise sum stated to be due in cancellation notices on three specific policies.

In addition, Church Mutual relies on another procedure of the company, i.e., that payments, which are made to reinstate policies after cancellation notices are sent, must be in the form of money orders or cashier's checks unless two narrow exceptions, not relevant here, apply. As a result of all this, Church Mutual took the position that the multi-peril policy was not in effect when the church burned down on September 11.

The courts below analyzed the issue presented in terms of contract law, finding that Mount Calvary did not accept Church Mutual's offer as set out in the notice of cancellation for the multi-peril policy. Mount Calvary did not send a money order or cashier's check. The courts found that by sending one uncertified check on the church's account to cover three premiums, Mount Calvary made a counteroffer. The bankruptcy court found that in cashing the check and depositing it in its own account, Church Mutual accepted the counteroffer. Because debtors have a right to direct their creditors as to which accounts they wish to pay, the bankruptcy court found that Mount Calvary had a right to direct payment to the three policies, including the multi-peril policy.

The district court disagreed with the bankruptcy court in one important regard. It concluded that Mount Calvary could not reasonably have interpreted Church Mutual's conduct as an acceptance of its counteroffer. Apparently finding Ms. Kleinschmidt's letter of July 18 considerably clearer than we do, the court determined that it was a rejection of the counteroffer. Because the court found that the intent to reject the counteroffer was clear, it concluded that the general rule that a debtor can direct where payment should go does not apply.

It is this final conclusion with which we disagree. We see nothing in the facts of this case to indicate that the general rule of Illinois law—that a debtor retains the right to direct where his payment goes—should not apply.

The law is clear on this issue. In *Alexander Lumber Co. v. Aetna Accident & Liability Co.*, 296 Ill. 500, 503, 129 N.E. 871 (1921), the court recognized that the "general rule as to the application of payments is that the debtor may specify the account to which he desires application made . . . ." *See also Village of Winfield v. Reliance Insurance Co.*, 64 Ill. App. 2d 253, 212 N.E.2d 10 (1965). By cashing the check, we conclude that Church Mutual accepted the payment. Even under circumstances much more egregious than this, the cashing of a past-due premium check was held to be acceptance of the payment. *See Van Hulle v. State Farm Mutual Automobile Ins. Co.*, 44 Ill. 2d 226; 254 N.E.2d 457 (1969). *Semento v. Tylman*, 230 Ill. App. 3d 701, 595 N.E.2d 688 (Ill. App. 1992), mentioned by the district court as an exception to the rule, involved a dispute between two dentists arising from the sale of a dental practice; it is unpersuasive as authority for looking past the established law of Illinois. In this case, involving an insurer and its insured, with all its attendant fiduciary responsibilities and public policy considerations, the general law of Illinois applies.

In fact, Church Mutual concedes the point that under ordinary circumstances, "Mount Calvary, as a debtor, may have the right to designate which of its debts will be paid

with a tendered check . . . ." The company goes on to say, however, that Mount Calvary's status as a debtor does not give it the right to compel Church Mutual to accept a tendered check as legal consideration to form a separate contract. Or as Church Mutual's lawyer said in his opening statement in the bankruptcy court:

> [W]hat Mount Calvary was trying to do was to jam its payment down Church Mutual's throat to get them to do something they never agreed to do.

That observation in the bankruptcy court was a bit of an overstatement. Church Mutual invited Mount Calvary to submit a premium payment. In making the payment, Mr. Barron was hardly jamming anything down the company's throat. It is true that he did not follow the company's instructions to the letter. He did not send the right kind of check. But under the unique facts of this case, that is at best a minor detail.

What we have here is a routine payment of a past-due premium by an insured to an insurance company with which it had previously done business. It seems unlikely that Mr. Barron had the concepts of Samuel Williston or Arthur Corbin in mind when he paid the bill. He did not intend to do anything as formal as present a counteroffer when he submitted the payment in a form that differed slightly from what the company requested. He was just paying the bills. But whatever was happening, if the insurance company did not like the check, it should have returned it and asked for a cashier's check or money order. It did not do that. Instead, it cashed the check, and the check was as good as gold.

But after accepting the money, the company applied the payment without regard to Mount Calvary's wishes. As an explanation for the company's action, Ms. Kleinschmidt wrote the July 18 letter. By its own terms, the letter refers only to the "policy indicated above," which is the commercial fire policy. The payment, she said, arrived too late to reinstate the fire insurance policy so the company was applying the proceeds of the check elsewhere. The

letter shows that somehow Ms. Kleinschmidt had the idea that Mr. Barron intended the payment to go in part to the fire policy—why else did she tell him it hadn't? In fact, the district court found that "Kleinschmidt did in fact see these cancellation notices accompanying Mount Calvary's July 13, 1989 check" and that she must have known or suspected what Mr. Barron intended.

Both courts below believed Mr. Barron's testimony that he inserted the specific cancellation notices for the three policies into the envelope with the check for $1,372.50. That Ms. Kleinschmidt said she did not see the notices is not controlling. Mount Calvary directed where the payment should go. In addition, Mr. Barron objected two or three times to the misapplication of the funds. His intention as to where the money should go was crystal clear. Nothing in Illinois law gave Church Mutual the right to cash the check and apply the proceeds to other purposes.

For these reasons, the judgment below is REVERSED and the case REMANDED for the entry of a judgment noting that the multi-peril insurance policy was in effect on the day of the fire.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

In re: MOUNT CALVARY BAPTIST CHURCH a/k/a Mount Calvary Baptist Church & School, Debtor. CHURCH MUTUAL INSURANCE COMPANY, Plaintiff, v. MOUNT CALVARY BAPTIST CHURCH a/k/a Mount Calvary Baptist Church & School and SEAWAY NATIONAL BANK, Defendants.

Case No. 94 C 673, 89 B 15632, 90 A 0174

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

172 Bankr. 880, 1994 U.S. Dist. LEXIS 13012

September 7, 1994, Decided

September 13, 1994, Docketed

JUDGES: Williams

OPINION BY ANN CLAIRE WILLIAMS
OPINION: MEMORANDUM OPINION AND ORDER

On September 11, 1989, a fire damaged the building and contents of Mt. Calvary Baptist Church on Chicago's south side. One week later, defendant Mount Calvary Baptist Church ("Mt. Calvary") filed for bankruptcy in United States Bankruptcy Court for the Northern District of Illinois. In November 1989, plaintiff Church Mutual Insurance Company ("Church Mutual") filed suit in the United States District Court for the Northern District of Illinois seeking a declaratory judgment that it was not liable to Mt. Calvary on a Multi-Peril insurance policy first issued in December 1987. The complaint was subsequently referred to the United States Bankruptcy

Court pursuant to 28 U.S.C. Section 157(a).[1]

A trial was held before United States Bankruptcy Judge David H. Coar on September 14, 15, and 17, 1993. On December 29, 1993, Judge Coar issued Proposed Findings of Fact and Conclusions of Law, holding that the Multi-Peril Policy remained in force as to Mt. Calvary and Seaway National Bank, the holder of a mortgage lien on the church, through the September 11, 1989 fire. This matter is presently before the court on Church Mutual's Rule 9033 Objections to the Proposed Findings of Fact and Conclusions of Law.[2] For the reasons stated below, the Objections are granted in part and denied in part. This court finds that the disputed Multi-Peril Policy was not in force at the time of the fire. Judgment is entered in favor of plaintiff Church Mutual.

Findings of Fact[3]

1. On September 11, 1989, a fire damaged the building and contents of Mt. Calvary Baptist Church.

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[1] Section 157(a) provides: Each district court may provide that any or all cases under Title 11 or arising in or related to a case under Title 11 shall be referred to the bankruptcy judges for the district.

[2] Under Bankruptcy Rule 9033(b), "within 10 days after being served with a copy of the proposed findings of fact and conclusions of law a party may serve and file with the clerk written objections which identify the specific proposed findings or conclusions objected to and state the grounds for such objection."

[3] After reviewing the entire record, the court adopts all of Judge Coar's findings with one exception. The findings to which objections have been filed are highlighted with an asterisk. These findings will be discussed in the first subsection of the "Discussion" section of this opinion.

2. On May 11, 1981, Mt. Calvary executed its Installment Note payable to Seaway in the principal sum of $1,200,000.00. To secure the Installment Note, on May 11, 1981, Mt. Calvary conveyed to Seaway a first mortgage lien on the Mt. Calvary Church located at 1257-59 West 111th Street, Chicago, Illinois. The Trust Deed was amended December 31, 1981.

3. On or about December 7, 1987, Church Mutual issued a Multi-Peril contract of insurance, number 061970-02-496353 (the "Policy") to Mt. Calvary, subject to terms, conditions, limitations and exclusions in the Policy. It is under this policy that Mt. Calvary claims coverage for losses incurred as a result of the September 11, 1989 fire.

4. Seaway is named as mortgagee under the Policy.

5. At various times, Church Mutual issued various other policies to Mt. Calvary, including, but not limited to, the following:

a.	Worker's Compensation	061970-07-500295
b.	Worker's Compensation	016970-07-557465
c.	Business Automobile	061970-09-502786
d.	Business Automobile	016970-09-557466
e.	Commercial Fire	016970-13-564633

6. On July 5, 1989, Church Mutual mailed to Mt. Calvary correspondence and Notices of Cancellation for the Business Automobile policy number 016970-09-557466 and the Worker's Compensation policy number 016970-07-557465. Mt. Calvary received this correspondence before July 12, 1989.

7. On July 10, 1989, Church Mutual mailed to Mt. Calvary correspondence and a Notice of Cancellation for the Multi-Peril Policy number 061970-02-496353. Mt. Cal-

vary received the correspondence and notice of cancellation on July 12, 1989.

8. On July 10, 1989, Church Mutual mailed to Seaway a Notice of Cancellation. Seaway received the notice of cancellation on or before July 24, 1989.

9. The cancellation notices provided for cancellation of the policies on the following dates:

a. Business Automobile	July 17, 1989
b. Worker's Compensation	July 17, 1989
c. Multi-Peril	July 22, 1989

10. All of the cancellations were for failure to pay premiums timely.

11. Each of the letters which accompanied the notices of cancellation included the amount of premium past due and provided that amount must be received within 10 days from the date of "this notice" or the policy would be cancelled. Each also contained the following language:

> "Please send us a BANK MONEY ORDER or CASHIER'S CHECK for $_____ and keep your protection uninterrupted. Uncertified personal checks will not be accepted."

12. The letters indicated that the amount of overdue premiums on each policy was as follows:

a. Business Automobile	$147.25
b. Worker's Compensation	$932.50
c. Multi-Peril	$292.75

13. On or about July 13, 1989, Willie Barron ("Barron") was financial secretary of Mt. Calvary and the duties of this office included the payment of bills.

14. On July 13, 1989, Barron wrote a check to Church Mutual for the total of past due premiums indicated in

the July 5 and July 10 correspondence from Church Mutual ($1372.50).

15. * Barron placed the check and copies of the three cancellation notices received in July, 1989 in an envelope and mailed the envelope to Church Mutual on July 13, 1989.

16. The envelope from Mt. Calvary was postmarked July 13, 1989 and received by Church Mutual on or about July 18, 1989. Mt. Calvary's business check in the amount of $1372.50 was deposited to Church Mutual's account on July 18, 1989. This check was not in the form of a money order or cashier's check.

17. For all relevant periods, Sharon Kleinschmidt ("Kleinschmidt") was Billing Accounts Receivable Supervisor for Church Mutual.

18. Kleinschmidt caused the $1372.50 payment from Mt. Calvary to be applied to earned premiums due on canceled or expired (terminated) policies rather than to the overdue premiums referred to in the notices of cancellation and correspondence to Mt. Calvary dated July 5 and July 10, 1989.

19. On July 18, 1989, Kleinschmidt wrote to Mt. Calvary advising it of the applications of the $1372.50 payment.

20. * On July 20, 1989, Barron received Kleinschmidt's letter and called to protest the application of the payment. He was told that there was nothing that could be done to change the outcome.

21. * In late August, 1989, Barron made one or two additional phone calls to Church Mutual protesting the application of the July 13, 1989 payment—all to no avail.

Barron was advised by Kleinschmidt that the Multi-Peril Policy was canceled effective July 22, 1989.

22. Church Mutual had an internal procedure whereby payments received without accompanying direction as to how the payment was to be applied would be applied first to earned premiums on canceled or expired policies and then to earned premiums on policies in effect. This policy was never communicated to insureds unless they asked.

23. * Kleinschmidt testified that she never saw the notices of cancellation which Barron placed in the envelope along with the check. The Court finds Kleinschmidt's testimony in this regard is based upon her deductions from what she did with respect to the $1372.50 payment and is not credible.

24. * Kleinschmidt should have known and had reason to know that Mt. Calvary's check dated July 13, 1989 was tendered to pay the earned premiums on the three policies on which cancellation notices were pending on July 18, 1989.

25. On or about July 18, 1989 (before application of the July 13, 1989 check), Mt. Calvary had earned premiums due on account for canceled or expired policies in an amount greater than $1372.50.

26. On or about July 18, 1989, Church Mutual had the following additional internal policies/procedures which were not communicated to insureds unless they asked specifically:

a. Payments to reinstate policies (after cancellation notices sent) must be in the form of money orders or cashier's checks. There were two exceptions:

1. There was a "first-time" rule which would allow payment by personal or business check after the first cancellation notice (this exception was available one time only).

2. There was also an exception for "special payment arrangements" pursuant to which an insured could pay by personal or business check after a cancellation notice if the payment was made pursuant to a payment schedule previously agreed to by Church Mutual.

b. There was a 10 day grace period after the 10 day period specified in the reinstatement letter which accompanied the notice of cancellation.

27. For purposes of determining when a payment is made, Church Mutual looks to the date of the postmark on the envelope containing the payment.

28. * Kleinschmidt must have known or at the very least suspected that Mt. Calvary's check dated July 13, 1989 was tendered to pay the earned premiums on the three policies on which cancellation notices were pending on July 18, 1989.

Standard of Review

In reviewing Proposed Findings of Fact and Law made pursuant to a section 157(c)(1) referral, this court conducts "a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with [Bankruptcy Rule 9033]." Bankruptcy Rule 9033(d). *In re Dillon Constr. Co.*, 922 F.2d 495, 497 (8th Cir. 1991).

Discussion

1. Objections to the Proposed Findings of Fact

Church Mutual objects to Findings No. 15, 20, 21, 23, and 24. The court addresses these objections below.

Finding No. 15, 23, 24, Church Mutual objects to the Bankruptcy Court's finding that Barron placed copies of the three cancellation notices in the envelope used to mail the July 13, 1989 check he sent to Church Mutual. (Finding No. 15). Church Mutual also objects to the Bankruptcy Court's related findings that Kleinschmidt saw the notices of cancellation which Barron had placed in the envelope, and that as a result, she should have known and had reason to know that Mt. Calvary tendered the check to reinstate/continue the three policies with pending cancellation notices.

Having reviewed the trial transcript, this court agrees with Bankruptcy Judge Coar's finding that Barron did in fact mail copies of the three cancellation notices in the same envelope as the July 13, 1989 check. As Church Mutual correctly observed, Kleinschmidt's testimony is suspect because she did not appear to be testifying from any independent recollection of events. She instead based her testimony on deductions from how she had applied the $1,372.50 payment. Though somewhat confused, Barron's testimony appears to be have been based on his actual recollection of the material events, and in this court's opinion is more credible.

The court similarly finds that Kleinschmidt did in fact see these cancellation notices accompanying Mt. Calvary's July 13, 1989 check. Again, the court does not find Kleinschmidt's testimony on this point credible in part because it was not based on any independent recollection

of the events. Having reached this conclusion, the court has little difficulty finding that Kleinschmidt should have known and had reason to know that the check was tendered to pay the three policies identified in the attached cancellation notices. Why else would the cancellation notices have been attached?

Findings No. 20, 21 - Church Mutual objects to Bankruptcy Judge Coar's proposed findings that Barron made two or three telephone calls to Church Mutual protesting the application of the church's check - one on July 20, 1989, and one or two in late August 1989. Having carefully reviewed the relevant portions of the transcript, the court agrees with Judge Coar that Barron telephoned Church Mutual on July 20, 1989 and at least one more time in August 1989.

Finding No. 28 - Finally, having concluded that Kleinschmidt did in fact see the three cancellation notices sent to Church Mutual along with Mt. Calvary's July 18, 1989 payment, the court also finds that Kleinschmidt must have known, or at the very least, suspected that Mt. Calvary intended the payment to be applied towards the three policies with pending cancellations. With more than eleven years experience at Church Mutual, Kleinschmidt knew that not all of the company's insureds followed Church Mutual's precise instructions on how to pay their premiums. Indeed, as noted above, Church Mutual had instituted various policies designed to deal with just this type of situation. Although Mt. Calvary did not send three separate certified checks or money orders as requested in the cancellation notices/offers of reinstatement, the church did send a check totalling the exact amount owed on all three policies. Under the circumstances, Kleinschmidt must have known or at the

very least suspected that Mt. Calvary tendered the check to reinstate/continue the three policies with pending cancellation notices.

II. Objections to the Proposed Conclusions of Law

In recommending that this court find that the disputed Multi-Peril insurance policy was in effect through the September 11, 1989 church fire, Bankruptcy Judge Coar first held that the form letters accompanying Church Mutual's cancellation notices constituted offers to reinstate/continue three of Mt. Calvary's policies. (Proposed Findings at 10-11). He next found that Mt. Calvary's tendering of a single personal check instead of the requested three certified checks or money orders constituted a rejection of this offer and a counter offer. (Id. at 11-12). Judge Coar interpreted this counter offer as follows:

> "Here is my business check in the amount of the premiums due (on the policies referenced in the enclosed notices), tendered to you prior to the effective date of the notice. You may keep this check if you agree to cancel the notice of cancellation and continue the policy in force."

(Id. at 12). Finally, Judge Coar found that Church Mutual accepted this counter offer through its negotiation of the check. (Id. at 16-18).

Church Mutual raises two general objections to these proposed conclusions of law. Church Mutual first argues that Judge Coar improperly construed Mt. Calvary's nonconforming response as a rejection and counter offer, and should have instead interpreted it as a mere rejection of the offer to reinstate. (PI. Obj. at 4-6). Noting that under Illinois law, the terms of an offer or acceptance must be

reasonably certain or no contract is formed (see *Caporale v. Mar Les, Inc.*, 656 F.2d 242, 245 (7th Cir. 1981)), Church Mutual asserts that Mt. Calvary's counter offer was too vague to create a binding contract.

This court disagrees. Under Illinois law, an offer cannot be relied on to create a binding contract if it omits essential terms of the agreement such that a court is unable "under proper rules of construction and applicable principles of equity, to ascertain what the parties have agreed to do." *Dawson v. General Motors Corp.*, 977 F.2d 369, 373 (7th Cir. 1992) (quoting *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 578 N.E.2d 981, 983, 161 Ill. Dec. 335 (Ill. 1991). Here, with the exception of the form of payment, all of the essential terms of Church Mutual's original offer were left standing through Mt. Calvary's non-conforming payment. Church Mutual simply offered to pay in the form of a single personal checks rather than three separate certified checks or money orders. If Church Mutual had accepted the offer, this court would have little difficulty ascertaining what the parties had agreed to do.

Church Mutual also objects to the Bankruptcy Court's conclusion that it accepted Mt. Calvary's counter offer through its negotiation of Church Mutual's check. Church Mutual objects to this conclusion on two grounds. First, Church Mutual argues that it could not have accepted the counteroffer because Kleinschmidt did not know a counteroffer had been made. This argument must fail because this court has found that Kleinschmidt must have known, or at the very least, suspected that Mt. Calvary's tendering of the personal check in conjunction with the three cancellation notices constituted an offer to reinstate/continue the policies in exchange for the check.

Church Mutual argues in the alternative that its mere negotiation of the check did not constitute acceptance, and that Kleinschmidt had instead clearly rejected any Mt. Calvary counteroffer in her July 18, 1989 letter to Barron. This second argument is less readily dismissed. Finding that Church Mutual rejected Mt. Calvary's counteroffer to reinstate/continue its Multi-Peril insurance policy, the court enters judgment in favor of plaintiff Church Mutual.

Under Illinois law, the intent of the parties controls the question of whether a contract exists. As the Bankruptcy Court properly recognized, when we speak of intent in the context of making contracts, the party's outward manifestation of intention controls, not some secret and unexpressed intention. *Connecticut General Life Ins. Co. v. Chicago Title and Trust Co.*, 714 F.2d 48, 50 (7th Cir. 1983). As Judge Learned Hand explained in *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D. N.Y. 1911), the contracting parties' actual intent is essentially irrelevant.

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party when he used the words intended something else than the usual meaning which the law imposes on them, he would still be held, unless there were mutual mistake or something else of the sort.

Thus, the apparently undisputed fact that Church Mutual intended to reject Mt. Calvary's counteroffer is

not dispositive. What matters is how Church Mutual conveyed this intended message to Mt. Calvary.

The court's inquiry into the objective intent of the parties is usually framed in terms of what the other party had reason to know or to believe. See E. Allan Farnsworth, Contracts Section 3.6 (2d ed. 1990). See also Restatement of Contracts Section 19(2), Conduct as Manifestation of Assent ("The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents"). In conducting this inquiry, it is essential that the court consider all relevant circumstances surrounding the making of the alleged contract. *Connecticut General*, 714 F.2d at 50 (citing *Borg,Warner Corp. v. Anchor Coupling Co.*, 16 Ill. 2d 234, 156 N.E.2d 513, 516 (Ill. 1958). After considering all of the relevant circumstances surrounding Church Mutual's response to Mt. Calvary's counteroffer, this court concludes that Mt. Calvary could not have reasonably interpreted Church Mutual's conduct as acceptance of its offer.

In finding that Church Mutual had accepted Mt. Calvary's counteroffer, the Bankruptcy Court correctly attached great significance to the insurance company's negotiation of Mt. Calvary's check. Indeed, absent any clear manifestation of Church Mutual's intention to the contrary, this court would agree that the mere negotiation of the check would have constituted acceptance. Unfortunately for Mt. Calvary, however, Church Mutual took several other steps coincident with its cashing of the check which clearly indicated its intention to reject any Mt. Calvary counteroffer. First, Church Mutual applied the proceeds from the check to Mt. Calvary's other ex-

pired policies, not to the requested policies that had yet to be canceled. Second, Kleinschmidt immediately wrote Mt. Calvary explaining how the money was applied. There can be no doubt that Mt. Calvary perceived this communication as a rejection of its offer because Barron immediately telephoned Kleinschmidt to protest upon his receipt of the letter two days later. Third, Kleinschmidt informed Barron on the telephone on July 20, 1989 that Church Mutual did not apply the check to the three policies as requested.

The mere fact that the check might have been negotiated a few minutes before Kleinschmidt wrote the letter has little legal significance. The object of the inquiry here is again to ascertain the effect that Church Mutual's outward manifestation of its intent might have had (or been expected to have had) on Mt. Calvary. Here, Mt. Calvary did not learn about (nor could have been reasonably expected to have learned about) Church Mutual's acceptance of its check until after its receipt of Kleinschmidt's letter. Under these circumstances, the court concludes that Mt. Calvary could not have reasonably interpreted Church Mutual's conduct as acceptance of its offer.

One question remains. As the Bankruptcy Court noted, case law exists for the proposition that under Illinois law, an insured has the authority to direct its insurer how to apply its payments. (Proposed Findings/Conclusions at 13, 16, citing *Griffin Wellpoint Corp. v. Engelhardt, Inc.*, 92 Ill.App.3d 252, 414 N.E.2d 941, 949, 46 Ill. Dec. 888 (Ill. App. 1980); *Village of Winfield v. Reliance Ins. Co.*, 64 Ill. App. 2d 253, 212 N.E.2d 10, 12 (Ill. App. 1965)). Under this theory, an insurer can either apply the funds as requested or return the check. It cannot properly cash the check and apply it to other delin-

quent accounts of the insured. (Id.). Yet, this is precisely what Church Mutual did here.

Under these circumstances, Mt. Calvary could argue that by improperly applying negotiating its check, Church Mutual has accepted the benefits of the contract, and should therefore be estopped from denying the contract's enforceability. The argument finds some, albeit superficial, support in Illinois law. Like their counterparts in most other jurisdictions, Illinois courts have long held that under some circumstances, acceptance of the benefits of a contract can constitute acceptance or ratification of the contract as a whole. See *Arduini v. Board of Educ.*, 93 Ill.App.3d 925, 418 N.E.2d 104, 107, 49 Ill. Dec. 460 (Ill. App. 1981) (citing *Toto v. Durand & Kasper Co.*, 214 Ill. App. 449 (1919)) (rev'd on other grounds, 92 Ill. 2d 197, 441 N.E.2d 73 (1982)); *In re Marriage of Sherrick*, 214 Ill.App.3d 92, 573 N.E.2d 335, 337-38, 157 Ill. Dec. 917 (Ill. App. 1991). Nevertheless, this general rule does not appear to apply where the acceptance of the benefits coincides with a clear manifestation of the party's intent to reject the offer. See. e.g., *Sementa v. Tylman*, 230 Ill.App.3d 701, 595 N.E.2d 688, 692, 172 Ill. Dec. 327 (Ill. App. 1992) (cashing of check intended to serve as offer does not constitute acceptance of contract where party clearly indicated intention not to be bound).[4] Thus, while Church Mutual's improper negotiation of the check may entitle Mt. Calvary to some form of restitution, it did not constitute acceptance of its offer to reinstate/continue the disputed policies.

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[4] Indeed, Mt. Calvary concedes that the mere cashing of the check alone does not qualify as acceptance. (Response at 9).

Conclusion

For the foregoing reasons, the court holds that Church Mutual never accepted Mt. Calvary's counteroffer and that the disputed Multi-Peril insurance policy was therefore not in effect at the time of the September 11, 1989 fire. Judgment is entered in favor of Church Mutual and against Mt. Calvary.

ENTER:

Ann Claire Williams, Judge
United States District Court

Dated: SEP - 7 1994

IN RE: MOUNT CALVARY BAPTIST CHURCH, a/k/a MOUNT CALVARY BAPTIST CHURCH & SCHOOL, Debtor. CHURCH MUTUAL INSURANCE COMPANY, Plaintiff, v. MOUNT CALVARY BAPTIST CHURCH, a/k/a MOUNT CALVARY BAPTIST CHURCH & SCHOOL and SEAWAY NATIONAL BANK, Defendants.

89 B 15632, 90 A 0174

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

162 Bankr. 181; 1993 Bankr. LEXIS 1938

December 29, 1993, Decided

COUNSEL: Lyle, Slaughler & Brewer, 900 W. Jackson, Chicago IL 60607 (representing Mount Calvary).

Johnson & Bell, 222 N. LaSalle St., Chicago IL 60601 (representing Church Mutual).

Gregory & Associates, 3250 W. Big Beaver, Troy, MI 48084 (representing Church Mutual).

Carney & Brothers, 30 N. LaSalle St., Chicago, IL 60602 (representing Seaway Bank).

JUDGES: Coar

OPINION BY DAVID H. COAR

OPINION: PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Court on Plaintiff's Complaint for declaratory relief. Mount Calvary Baptist Church ["Mt. Calvary"] filed for relief under Chapter II

of the Bankruptcy Code on September 18, 1989. In November, 1989, Church Mutual Insurance Company ["Church Mutual"] filed this complaint in the U.S. District Court for the Northern District of Illinois. Subsequently, the complaint was referred to this Court pursuant to 28 U.S.C. Section 157(a). This is a related to matter as to which jurisdiction is conferred by 28 U.S.C. Section 1334(b). Motions for summary judgment were filed by both Plaintiff, Church Mutual, and Seaway National Bank ["Seaway"]. The Court denied both motions in a Memorandum Opinion and Order dated November 6, 1992 ["Opinion"]. Trial on this matter was held on September 14, 15 and 17, 1993. Much about this proceeding is set forth in that Opinion and will not be repeated here. The Court now enters Findings of Fact and Conclusions of Law after review of the pleadings, memoranda and evidence presented.

FINDINGS OF FACT

1. On September 11, 1989, a fire damaged the building and contents of Mt. Calvary Baptist Church.

2. On May 11, 1981, Mt. Calvary executed its Installment Note payable to Seaway in the principal sum of $1,200,000.00. To secure the Installment Note, on May 11, 1981, Mt. Calvary conveyed to Seaway a first mortgage lien on the Mt. Calvary church located at 1257-59 West 111th Street, Chicago, Illinois. The Trust Deed was amended December 31, 1981.

3. On or about December 7, 1987, Church Mutual issued a Multi-Peril contract of insurance, number 061970-02-496353 (the "Policy") to Mt. Calvary, subject to terms, conditions, limitations and exclusions in the Policy. It is

under this policy that Mt. Calvary claims coverage for losses incurred as a result of the September 11, 1989 fire.

4. Seaway is named as mortgagee under the Policy.

5. At various times, Church Mutual issued various other policies to Mt. Calvary, including, but not limited to, the following:

a.	Worker's Compensation	061970-07-500295
b.	Worker's Compensation	016970-07-557465
c.	Business Automobile	061970-09-502786
d.	Business Automobile	016970-09-557466
e.	Commercial Fire	016970-13-564633

6. On July 5, 1989, Church Mutual mailed to Mt. Calvary correspondence and Notices of Cancellation for the Business Automobile policy number 016970-09-557466 and the Worker's Compensation policy number 8. On July 10, 1989, Church Mutual mailed to Seaway 016970-07-557465. Mt. Calvary received this correspondence before July 12, 1989.

7. On July 10, 1989, Church Mutual mailed to Mt Calvary correspondence and a Notice of Cancellation for the Multi-Peril Policy Number 061970-02-496353. Mt. Calvary received the correspondence and notice of cancellation on July 12, 1989.

8. On July 10, 1889, Church Mutual mailed to Seaway a Notice of Cancellation. Seaway received the notice of cancellation on or before July 24, 1989.

9. The cancellation notices provided for cancellation of the policies on the following dates:

a.	Business Automobile	July 17, 1989
b.	Worker's Compensation	July 17, 1989
c.	Multi-Peril	July 22, 1989

10. All of the cancellations were for failure to pay premiums timely.

11. Each of the letters which accompanied the notices of cancellation included the amount of premium past due and provided that that amount must be received within 10 days from the date of "this notice" or the policy would be cancelled. Each also contained the following language:

> "Please send us a BANK MONEY ORDER or CASHIER'S CHECK for $_____ and keep your protection uninterrupted. Uncertified personal checks will not be accepted."

12. The letters indicated that the amount of overdue premiums on each policy was as follows:

a.	Business Automobile	$ 147.25
b.	Worker's Compensation	$ 932.50
c.	Multi-Peril	$ 292.75

13. On or about July 13, 1989, Willie Barron ("Barron") was financial secretary of Mt. Calvary and the duties of this office included the payment of bills.

14. On July 13, 1989, Barron wrote a check to Church Mutual for the total of past due premiums indicated in the July 5 and July 10 correspondence from Church Mutual $1,372.50.

15. Barron placed the check and copies of the three cancellation notices received in July, 1989 in an envelope and mailed the envelope to Church Mutual on July 13, 1989.

16. The envelope from Mt. Calvary was postmarked July 13, 1989 and received by Church Mutual on or about July 18, 1993. Mt. Calvary's business check in the amount of $1372.50 was deposited to Church Mutual's

account in July 18, 1989. This check was not in the form of a money order or cashier's check.

17. For all relevant periods, Sharon Kleinschmidt ("Kleinschmidt") was Billing Accounts Receivable Supervisor for Church Mutual.

18. Kleinschmidt caused the $1,372.50 payment from Mt. Calvary to be applied to earned premiums due on canceled or expired (terminated) policies rather than to the overdue premiums referred to in the notices of cancellation and correspondence to Mt. Calvary dated July 5 and July 10, 1989.

19. On July 18, 1989, Kleinschmidt wrote to Mt. Calvary advising it of the applications of the $1372.50 payment.

20. On July 20, 1989, Barron received Kleinschmidt's letter and called to protest the application of the payment. He was told that there was nothing that could be done to change the outcome.

21. In late August, 1989, Barron made one or two additional phone calls to Church Mutual protesting the application of the July 13, 1989 payment - all to no avail. Barron was advised by Kleinschmidt that the Multi-Peril Policy was canceled effective July 22, 1989.

22. Church Mutual had an internal procedure whereby payments received without accompanying direction as to how the payment was to be applied would be applied first to earned premiums on canceled or expired policies and then to earned premiums on policies in effect. This policy was never communicated to insureds unless they asked.

23. Kleinschmidt testified that she never saw the notices of cancellation which Barron placed in the envelope along with the check. The Court finds that Kleinschmidt's testimony in this regard is based upon her deductions from what she did with respect to the $1372.50 payment and is not credible.

24. Kleinschmidt should have known and had reason to know that Mt. Calvary's check dated July 13, 1989 was tendered to pay the earned premiums on the three policies on which cancellation notices were pending on July 18, 1989.

25. On or about July 18, 1989 (before application of the July 13, 1989 check), Mt. Calvary had earned premiums due on account for canceled or expired policies in an amount greater than $1372.50.

26. On or about July 18, 1989, Church Mutual had the following additional internal policies/procedures which were not communicated to insureds unless they asked specifically:

a. Payments to reinstate policies (after cancellation notices sent) must be in the form of money orders or cashier's checks. There were two exceptions:

1. There was a "first-time" rule which would allow payment by personal or business check after the first cancellation notice (this exception was available one time only).

2. There was also an exception for "special payment arrangements" pursuant to which an insured could pay by personal or business check after a cancellation notice if the payment was made pursuant to a payment schedule previously agreed to by Church Mutual.

b. There was a 10 day grace period after the 10 day period specified in the reinstatement letter which accompanied the notice of cancellation.

27. For purposes of determining when a payment is made, Church Mutual looks to the date of the postmark on the envelope containing the payment.

CONCLUSIONS OF LAW & ADDITIONAL FINDINGS OF FACT

At the heart of this dispute is whether a contract for insurance was in force between Church Mutual and Mt. Calvary on September, 11, 1989. Specifically, the parties disagree about whether the Multi-Peril Policy was effectively canceled as of July 22, 1989. Insurance policies are contracts, and should be interpreted as such. *Homing Wire Corp. v. Home Indem. Co.*, 8 F.3d 587, 589 (7th Cir. 1993). The law is well settled that a contract requires an offer, acceptance, and consideration. *Serpe v. Williams*, 776 F. Supp. 1285, 1287-88 (N.D. Ill. 1991). Additionally, there must be a meeting of the minds about both the existence of a contract and its terms. *Chicago Litho Plate Graining Co., Ltd. v. Allstate Can Co.*, 838 F.2d 927 (7th Cir. 1988); *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 578 N.E.2d 981, 161 Ill. Dec. 335 (Ill. 1991). This case presents mixed questions of law and fact regarding whether each element of contract formation has been satisfied.

As a preliminary matter, the Court notes that insurance contracts are to be construed strictly against the drafter and in favor of coverage. *Insurance Corp. of Ireland v. Board of Trustees of So. Ill. Univ.*, 93 7 F.2d 331, 336 (7th Cir. 1991); *In re Templeton*, 150 Bankr.

214, 221 (Bankr. N.D. Ill. 1993); *Grevas v. United States Fidelity & Guar. Co.*, 152 Ill. 2d 407, 604 N.E.2d 942, 944, 178 Ill. Dec. 419 (Ill. 1992). The Court must construe a contract for insurance to permit the maximum recovery under a reasonable view of its terms. *Templeton*, 150 Bankr. at 220. This rule of construction also applies to notices of policy termination. *Farmers Auto. Ins. Ass'n v. Pursley*, 130 Ill. App. 2d 980, 267 N.E.2d 734, 737 (Ill. App. 1971). See also *Playboy Enters. Inc. v. St. Paul Fire & Marine Ins. Co.*, 769 F.2d 425, 428 (7th Cir. 1985) (noting that insurance contracts are rigorously construed against insurers wishing to limit liability or deny coverage). Further, forfeitures of insurance contracts are disfavored under Illinois law. *Playboy Enters.*, 769 F.2d at 428, *Radovanov v. Land Title Co. of Am.*, 189 Ill. App. 3d 433, 545 N.E.2d 351, 355, 136 Ill. Dec. 827 (Ill. App. 1989), appeal denied, 550 N.E.2d 565 (1990). An insurer cannot forfeit a policy unless it can establish a clear right to do so. *Time Ins. Co. v. Vick*, 250 Ill. App. 3d 465, 620 N.E.2d 1309, 1312, 190 Ill. Dec. 48 (Ill. App. 1993); *Budelman v. American Ins. Co.*, 297 Ill. 222, 130 N.E. 513 (Ill. 1921). Thus an insurer seeking to cancel a policy has the burden of proof on that issue. *Cullen v. North Am. Co.*, 176 Ill. App. 3d 643, 531 N.E.2d 390, 126 Ill. Dec. 95 (Ill. App. 1983).

At various times, Church Mutual has maintained that the Policy was canceled on the date that the cancellation notice issued (July 10, 1989). When read together with the reinstatement letter and state policy, it is clear that the cancellation notice advises the debtor that the policy will be canceled on the effective date set forth in the notice. The Notice itself was merely the notification required as a matter of due process (and state law) to

inform the insured that the policy was being terminated and to provide the insured an opportunity to obtain new coverage. See *Conley v. Ratayzcak*, 92 Ill. App. 3d 29, 414 N.E.2d 500, 503, 46 Ill. Dec. 616 (Ill. App. 1980) (construing the parallel provision for automobile insurance). Such notice is required by both the Policy itself and by statute. 215 ILCS 5/143.15.[1] Accordingly, the earliest possible date of cancellation of the Policy is July 22, 1989. The Court will now examine whether Mt. Calvary took appropriate actions to avoid cancellation of its insurance coverage.

OFFER/COUNTER-OFFER

Whether the policy was canceled on the date that notice was sent (the cancellation to be effective as of the effective date) or whether it was not canceled until the effective date is, under the facts of this case, a metaphysical question—interesting but of little practical significance. For the reasons stated above, the Court concludes that cancellation could not occur until July 22, 1989. However, neither the Policy nor the notice of cancellation gives the insured a right to void a notice of cancellation for nonpayment of premiums by tendering payment of the overdue premium before the effective date. No party has cited to any case law recognizing such a right of the insured and this Court has found no cases to this effect.

The only "right" that the insured has to void the notice of cancellation and keep the policy in force arises from the terms of the form letters which Church Mutual mails with its notices of cancellation. For brevity's sake, the

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[1] Formerly Ill.Rev.Stat. ch. 73, para. 755.15.

Court will refer to those letters as reinstatement letters. Thus, Church Mutual argues that its July 10, 1989 letter to Mt. Calvary was a written offer to continue (reinstate) coverage which was binding only upon acceptance in strict conformance with its terms. Because Mt. Calvary's check was not in the form of a money order or cashier's check and was not in the amount of $292.75, Church Mutual argues that there was no acceptance of the offer.[2]

Seaway and Mt. Calvary apparently concede that the form of the July 13 check did not meet the terms of Church Mutual's offer. The Defendants argue, however, that the check and accompanying notices of cancellation constituted a counter-offer to Church Mutual which was accepted by Church Mutual when it negotiated the check.

The Defendants contend that the amount set forth in the reinstatement letter (Church Mutual's offer) was not an essential term of the offer so long as the amount tendered was equal to or greater than the amount then overdue. The Defendants are correct. Church Mutual's witnesses offered no policy reason or experience which tended to justify strict adherence to the exact amount specified in the reinstatement letter so long as the amount tendered was not less than the amount due. Church Mutual maintains that the tender of the check, even if accompanied by the notices of cancellation, was too vague to constitute a counter-offer. The fallacy of this argument becomes clear when the offer and counter-offer are examined. Reduced to its essential terms, Church Mutual's reinstatement offer provided as follows:

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[2] Church Mutual does not (nor could it) contend that Mt. Calvary's July 13, 1989 check was not received (postmarked) within the time limits set forth in its July 10 offer.

> "If, prior to the effective date of the notice of cancellation, you send us a money order or cashier's check in an amount not less than the premium payments due on this policy, we will cancel the notice of cancellation and continue the policy in force."

This "offer" by Church Mutual could have been accepted by performance by Mt. Calvary—by sending, before the effective date, a money order or cashier's check in an amount equal to or greater than the amount due.

Instead, Mt. Calvary counter-offered. Mt. Calvary and Seaway contend that the tender of a non-conforming check is a counter-offer, which both rejects an offer and presents an alternative offer. *D'Agostino v. Bank of Ravenswood*, 205 Ill. App. 3d 898, 563 N.E.2d 886, 150 Ill. Dec. 759 (Ill. App. 1990), appeal denied, 571 N.E.2d 147 (1991); *Loeb v. Gray*, 131 Ill. App. 3d 793, 475 N.E.2d 1342, 1346-47, 86 Ill. Dec. 775 (Ill. App. 1985). The Defendants maintain that Church Mutual accepted the offer by cashing the check. *In re Avildsen Tools & Machines, Inc.*, 30 Bankr. 911, 917 (Bankr. N.D. Ill. 1983), rev'd on other grounds, 40 Bankr. 253 (N.D. Ill. 1984); *Sementa v. Intan*, 230 Ill. App. 3d 701, 595 N.E.2d 688, 692, 172 Ill. Dec. 327 (Ill. App. 1992). The tender of the business check, accompanied by the notices of cancellation, reasonably communicated to Church Mutual the following:

> "Here is my business check in the amount of the premiums due (on the policies referenced in the enclosed notices), tendered to you prior to the effective date of the notice. You may keep this check if you agree to cancel the notice of cancellation and continue the policy in force."

This counter-offer could be accepted by negotiating the check.

But why should Church Mutual be obligated to do anything other than keep the check and apply it as Church Mutual saw fit? There is no dispute that, as of July 18, 1989, Mt. Calvary owed amounts to Church Mutual on already canceled or terminated policies.

Debtors have a right to direct their creditors as to which accounts they wish to pay. *In re Zurliene*, 97 Bankr. 460, 465-66 (Bankr. S.D. Ill. 1989); *Greene v. United States*, 447 F. Supp. 885, 892 (N.D. Ill. 1985); *Griffin Wellpoint Corp. v. Engelhardt, Inc.*, 92 Ill. App. 3d 252, 414 N.E.2d 941, 949, 46 Ill. Dec. 888 (Ill. App. 1980). The same principle allows insureds to direct which policies are to be paid to their carriers. *Village of Winfield v. Reliance Ins. Co.*, 64 Ill. App. 2d 253, 212 N.E.2d 10, 12 (Ill. App. 1965). Because Mt. Calvary's July 13 check contained copies of the cancellation notices, Church Mutual knew or should have known that Mt. Calvary was directing it to apply that check to the three policies referred to in the cancellation notices and therefore constituted a direction to Church Mutual as to how to apply the payment.

Kleinschmidt testified that she applied the payment as she did because she did not receive any direction from Mt. Calvary as to how the payment was to be applied. Had she known, she says, that Mt. Calvary intended that the funds be applied to the premiums due on the three policies for which cancellations were pending, she would have returned the check because it was not a money order or cashier's check. Mt. Calvary's check was not drawn for the exact dollar amount of the premium balance on the Policy. According to Kleinschmidt, she

could not tell what Mt. Calvary intended because the check was not made in the exact amount of the premium due on any policy.

To evaluate this testimony and Church Mutual's position with respect thereto, it is helpful to consider what Kleinschmidt had available to her on July 18, 1989. If she called up the status of the Mt. Calvary account on her computer screen, she would have ascertained that there were six Mt. Calvary policies with account balances due. Of the six, three had been canceled or terminated and were not capable of reinstatement. The remaining three were:

Multi-Peril	#061970-02-496353	$292.75
Worker's Compensation	#061970-07-557465	$932.50
Business Automobile	#061970-09-557466	$147.25

As to these latter three, there were pending notices of cancellation and the envelope containing the $1,372.50 was postmarked July 13, 1989—well within the time period for reinstatement of all three policies. Had she wanted to verify the obvious—all she needed to have done was add the amounts that her computer screen showed her were due on these three policies. Miraculously, that would have produced the figure of $1,372.50.

And this assumes that Mt. Calvary did not tell Church Mutual how to apply the payment. The credible evidence is otherwise. Barron enclosed the three cancellation letters in the envelope with the check. If the notices were in the same envelope as the check, Church Mutual could not have received the latter without having received the former. These notices shouted to Church Mutual how Mt. Calvary wished the payment to be applied.

Further, Barron informed Kleinschmidt of Mt. Calvary's intent with regard to the application of the check during a phone conversation on July 20, 1989. This call occurred two days prior to the cancellation date of the Policy. Because Church Mutual had directions from Mt. Calvary, it was required to abide by Mt. Calvary's wishes in applying the payment. Had Church Mutual wanted to refuse the business check, it could have returned the check to Mt. Calvary without depositing it. Because Church Mutual deposited the check, it was bound to apply the funds in the manner directed by Mt. Calvary.

It is at this point that we encounter the heart of Church Mutual's argument. The law, says Church Mutual, is that its July 10, 1989 letter (which accompanied the cancellation notice) was an offer to reinstate the policy if Mt. Calvary: (1) paid the overdue premium, (2) with a money order or cashier's check, (3) for the exact amount due,[3] (4) within the time frame set forth in the letters. Acceptance of that offer must be in strict accord with the terms of the offer. Citations will be omitted because neither Seaway nor Mt. Calvary seriously dispute this statement of the law.

According to Church Mutual, Mt. Calvary's business check was not an acceptance of its offer. Under a strict view of contract interpretation, Mt. Calvary could not

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[3] Church Mutual reads too much into the space on the standard form that includes the amount due. As discussed above, this Court does not conclude that payment in the exact amount of earned premium due is an essential part of the offer—it is merely informational. If, for example, Mt. Calvary had tendered a cashier's check in the amount of $293.00 within the 10 day limit, there is no doubt that Church Mutual would have accepted the payment.

accept by tendering a non-conforming payment. However, the Defendants deny that a particular form of payment was necessary for reinstatement. Rather, acceptance could be effected by business check in accordance with the prior course of dealings between the parties.

Church Mutual argues that even if it received the notices of cancellation and the check, its negotiation of the check cannot be said to constitute acceptance because on the same day that it deposited the check, it mailed to Mt. Calvary a letter which stated that the funds were not being applied to the three policies referred to in the cancellation notices. Church Mutual quotes from the Restatement (2d) of Contracts, Section 38, Rejection:

> (2) A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement.

This argument conveniently ignores the fact that to the extent that Mt. Calvary had directed Church Mutual to apply the funds to the policies referred to in the accompanying notices, Church Mutual was legally bound to apply the payment as directed or return the payment. See, *In re Zurliene*, 97 Bankr. 460, 465-66 (Bankr. S.D. Ill. 1989). But there is a kernel of truth in Church Mutual's argument: how can Church Mutual be said to have accepted Mt. Calvary's counter-offer when Kleinschmidt, Church Mutual's agent for these purposes, saw only the check and did not understand that Mt. Calvary was making a counter-offer. Indeed, she wrote the July 18, 1993 letter specifically stating that Church Mutual was applying the payment in a way inconsistent with the notion of acceptance of the counter-offer. But writing the letter was the second thing that she did. The first was applying the check. Church Mutual cites *Loeb v. Gray*, 131 Ill.

App. 3d 793, 475 N.E.2d 1342, 86 Ill. Dec. 775 (Ill. App. 1985), for the requirement of mutual assent in contract formation.

But, remember that Church Mutual could "assent" to the counter-offer by negotiating the business check. The Restatement of Contracts Section 19, Conduct as Manifestation of Assent provides:

> (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act. (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents. (3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be avoidable because of fraud, duress, mistake; or other invalidating cause. (emphasis added)

The depositing of Mt. Calvary's check was a manifestation of Church Mutual's assent to the counteroffer—Church Mutual intended to cash the check and had reason to know that Mt. Calvary might infer assent from the act of negotiating the check. What Kleinschmidt intended subjectively is not determinative—it is Church Mutual's objective manifestation that controls. See, *Laserage Technology v. Laserage Labs.*, 972 F.2d 799, 802 (7th Cir. 1992); E. Allan Farnsworth, Contracts Section 3.6 (2d ed. 1990); E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 Yale L. J. 939, 943-44 (1967). A person has "reason to know a fact if that person has information" from which a person of ordinary intelligence would infer that the fact in question exists. There is also

reason to know if the inference would be that there is such a substantial chance of the existence of the fact that if exercising reasonable care with reference to the matter in question, the person would predicate his action upon the assumption of its probable existence. Restatement (2d) Contracts Section 19, comment (b).

Even assuming that the notices of cancellation (but not the check) were somehow lost between the mailroom and Kleinschmidt's desk, her experience and her computer screen told her what the payment was for. She knew that cancellation notices were priority matters for insureds. She knew that of the six policies that appeared on her screen under Mt. Calvary's account number, three could be reinstated as of July 18, 1989. While generally insurance companies may not be obligated to manipulate numbers in an attempt to decipher the insured's intent with respect to payments, here, the intent was so apparent that basic curiosity should have compelled her to add the total premiums due for the three policies capable of reinstatement and see that the check was for that exact amount.

But suppose Church Mutual simply made a mistake. Unilateral mistake does not make a contract voidable except under extraordinary circumstances not present here.

See generally, Restatement (2d) Contracts Section 153. The "mistake" occurred because Church Mutual either ignored or lost the notices of cancellation that accompanied Mt. Calvary's check and refused to attempt to ascertain Mt. Calvary's intent through non-burdensome inquiry, even though the information available to it and prior experience suggested that the check was probably intended to pay outstanding premiums on policies subject to current cancellation notices. Therefore, Church Mutual

accepted the Mt. Calvary counter-offer and Kleinschmidt's alleged mistake as to the effect of depositing the check does not rise to the level necessary to void enforcement of the ensuing agreement.

OTHER ARGUMENTS

A. Duty of Care

The Defendants also urge that insurance companies owe a duty of good faith, reasonable care and diligence to their insureds. *Cleary v. Country Mut. Ins. Co.*, 63 Ill. App. 3d 637, 380 N.E.2d 525, 526, 20 Ill. Dec. 547 (Ill. App. 1978); *Village of Winfield v. Reliance Ins. Co.*, 64 Ill. App. 2d 253, 212 N.E.2d 10, 12 (Ill. App. 1965). However, these cases apply only to the duties owed by an insurer during the process of writing and issuing policies for insureds. They do not hold that there is a higher duty of care required for the application of premiums to insured's accounts. The Court has found no case law suggesting that an insurer owes a higher duty than reasonable care in this context, or that insurance companies must apply premium payments in a way that most benefits the insured. Reasonable care under the circumstances would require more than what was done.

B. Prior Course of Dealing

Let us turn to the Defendants' argument that payment by business check in fact conformed to the Church Mutual offer because of a prior course of dealing between Church Mutual and Mt. Calvary. A course of dealing is a sequence of previous conduct between parties to a transaction which is fairly to be regarded as establishing

a common basis of understanding for interpreting their expressions and other conduct in later similar transactions. 810 ILCS 5/1-205;[4] *Capitol Converting Equip., Inc. v. LEP Trans. Inc.*, 965 F.2d 391, 395 (7th Cir. 1992). This definition applies to all types of commercial contracts. *Id.* at 395 n. 5. Whether a course of dealing exists between the parties is a factual question; there is no specific amount of prior conduct that is required to establish a course of dealing as a matter of law. *Id.* at 395. Clearly, a single transaction is insufficient to give rise to a course of dealing. *Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1385 (9th Cir. 1986), cert. denied, 480 U.S. 906, 94 L. Ed. 2d 520, 107 S. Ct. 1349 (1987); *In re Frederes*, 98 Bankr. 165, 167 (Bankr. W.D. N.Y. 1989); *Accutool Precision Machining, Inc. v. Denver Metal Finishing*, 680 F.2d 861, 863 (Colo. App. 1984); *Sun River Cattle Co. v. Miners Bank of Mont. N.A.*, 164 Mont. 237, 521 F.2d 679, 688 (Mont. 1974). Hundreds of deals between the parties, in contrast, may establish a course of dealing. *Capitol Converting Equip. v. LEP Transp.*, 750 F. Supp. 862, 867 (N.D. Ill. 1990).

An example is illustrative. An insurance company canceled coverage on six separate occasions. *Bergdorf v. Allstate Ins. Co.*, 541 So. 2d 716 (Fla. App.), cert. denied, 551 So. 2d 460 (1989). The insured tendered late payments each time, and each time the policy was reinstated. The seventh time the policy was canceled the insured sent a late payment which was rejected. The Florida court held that the conduct of the insurance carrier of consistently reinstating coverage after notifying the insured of cancellation had established a uniform con-

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[4] Formerly Ill. Rev. Stat. Ch. 26, para. 1-205.

duct of doing business to allow the insured to rely thereon. 541 So. 2d at 717.

The Defendants maintain that Church Mutual's acceptance of Mt. Calvary's business checks on prior occasions established a course of dealing between the parties upon which Mt. Calvary reasonably relied. But unlike the insurer in Bergdorf, Church Mutual only accepted a business check in the face of a cancellation notice twice. In January, 1989 pursuant to the one-time forgiveness rule, and once pursuant to a special payment agreement. While Church Mutual may have accepted business checks for reinstatement of other policies, or for timely paid premiums for the Policy, the Defendants have not shown sufficient deviations to constitute a course of dealing.

The Defendants further argue that because Church Mutual never rejected a business check from Mt. Calvary in the past, the right to dictate the mode of payment in the future was waived. Waiver is a voluntary and intentional relinquishment of a known right. *Homing Wire Corp. v. Home Indem. Co.*, 8 F.3d 587, 590 (7th Cir. 1993); *Kelly v. Economy Fire & Cas. Co.*, 196 Ill. App. 3d 337, 553 N.E.2d 412, 413, 142 Ill. Dec. 898 (Ill. App.), appeal denied, 555 N.E.2d 377 (Ill. 1990). To be sure, an insurance company may waive written contract provisions through its conduct. *Homing Wire*, 8 F.3d at 590, *Spiers v. Union Life Ins. Co.*, 345 Ill. App. 351, 103 N.E.2d 165, 168 (Ill. App. 1952). Moreover, if the insurer's conduct leads the insured to believe that a forfeiture provision will not be enforced, the insurer will be estopped from taking advantage of such forfeiture. *Time Ins. Co. v. Vick*, 250 Ill. App. 3d 465, 620 N.E.2d 1309, 1312, 190 Ill. Dec. 48 (Ill. App. 1993). Whether such

waiver or estoppel occurred is a question of fact. *Kelly*, 553 N.E.2d at 413; *Spiers*, 103 N.E.2d at 168.

In this case, the Policy is silent regarding the form of payment required for payments of either timely or tardy premiums. The cancellation notices, in contrast, explicitly demand payment in the form of a money order or cashier's check. Church Mutual is understandably unwilling to bear the risk of accepting personal checks from insureds who are perpetually delinquent in their payments. Church Mutual asserts that it did not voluntarily relinquish the right to demand money orders and cashier's checks in the future by accepting personal checks on prior occasions. The Court agrees. Past forgiveness pursuant to a clear internal rule does not preclude Church Mutual's later insistence on compliance with the terms of cancellation notices. *Kelly*, 553 N.E.2d at 414. The clarity of Church Mutual's rule is subject to some doubt. However, in the absence of more substantial evidence of noncompliance with the stated procedure, waiver is not supportable.

This is not to condone the actions of Kleinschmidt with respect to her handling of this matter. Church Mutual's one time only" rule was undisclosed to insureds. From Mt. Calvary's perspective, Church Mutual was willing to accept business checks because it had done so in the past for both timely and delinquent premium payments. Further, Barron spoke with Kleinschmidt on July 20, 1989 regarding the application of the check. At that time, the Policy had not been canceled (or the cancellation was not yet effective), and Mt. Calvary could have kept its coverage in place by mailing a cashier's check or money order within the next two days. However, Kleinschmidt informed Barron that the Policy was canceled with no hope

for reinstatement. This statement was untrue and inconsistent with the terms of the reinstatement letter. Moreover, Kleinschmidt knew that Church Mutual would have accepted an otherwise conforming payment as much as ten days late without interrupting Mt. Calvary's coverage. Kleinschmidt failed to inform Mt. Calvary of this fact as well. This activity is hardly consistent with Kleinschmidt's testimony about helping the insureds.

C. Modifications

The Defendants suggest that even if the cancellation notices required Mt. Calvary to send separate certified checks or money orders for the exact dollar amount of the deficiencies of each policy, they may still prevail. They maintain that the cancellation notices may be construed as modifications of the Policy. Modifications of insurance policies must be approved and accepted by the appropriate state authorities. 215 ILCS 5/143.[5] Such approval is evidenced by a formal endorsement from the state insurance commissioner. Church Mutual concedes that an amendatory endorsement was not obtained in this case, but maintains that it was unnecessary. While the Notice in this case may reasonably be construed as an attempted modification of the course of dealing between the parties, it was not a modification of the Policy requiring additional state approval.

SEAWAY'S CONCERNS

Seaway maintains that it was protected under the mortgage clause regardless of whether Mt. Calvary was

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[5] Formerly Ill. Rev. Stat. Ch. 73, para. 755.

covered under the Policy. Mortgage clauses create an independent relationship between the insurance provider and the mortgagee. *Seventh Avenue Boutique, Inc. v. Aetna Ins. Co.*, 573 F. Supp. 1027, 1028 (N.D. Ill. 1983); *Aetna State Bank v. Maryland Cas. Co.*, 345 F. Supp. 903, 905 (N.D. Ill. 1972). When the insured fails to pay premiums, the mortgagee is obligated to make the payments. Mortgage clauses are designed to protect the interests of the mortgagee from the insured's default. 5A Appleman's Insurance Law & Practice, Sections 3401, 3402; 10A Couch on Insurance 2d Section 42. Thus acts or omissions by the insured do not terminate the mortgagee's rights. *General Motors Acceptance Corp. v. Western Fire Ins. Co.*, 45 7 S.W.2d 234 (Mo. App. 1970).

Seaway's position was considered in the Memorandum Opinion entered on November 9, 1992, and will not be rehashed here except to adopt the conclusions reached there as part of this document. Because this Court has concluded that the Policy remained in force as to Mt. Calvary after July 22, 1989, there is no reason to conclude that it did not also remain in effect as to Seaway.

CONCLUSION

Church Mutual's letter of July 10, 1989 constituted an offer to reinstate/continue the Multi-Peril Policy in force if Mt. Calvary tendered the premium due before July 22, 1989 in the form of a money order or cashier's check. Mt. Calvary's tender of its business check in the amount of $1,372.50 on July 13, 1989 was a counter-offer to pay by business check which was accepted by Church Mutual when it deposited the check. Accordingly, the Multi-Peril Policy remained in force as to Mt. Calvary and Seaway

through and including the date of the fire in September, 1989.

Dated: December 29, 1993

David H. Coar, U.S. Bankruptcy Judge (EDITIOR'S NOTE: The following court-provided text does not appear at this cite in 162 Bankr.)

ORDER

This matter came on for trial before the Court on Plaintiff's Complaint for declaratory relief on September 14, 15 and 17, 1993. Having reviewed the pleadings, memoranda and evidence presented, the Court HEREBY ORDERS that the rights of the parties are as follows:

1. CHURCH MUTUAL'S letter of July 10, 1989 constituted an offer to continue the Multi-Peril Policy in force if MT. CALVARY tendered the premium due before July 22, 1989 in the form of a money order or cashier's check.

2. MT. CALVARY'S tender of a business check in the amount of $1,372.50 on July 13, 1989 was a counteroffer which was accepted by CHURCH MUTUAL when it deposited the check.

3. The Multi-Peril Policy remained in force as to MT. CALVARY through and including the date of the fire in September, 1989.

4. The Multi-Peril Policy remained in force as to SEAWAY through and including the date of the fire in September, 1989.

Dated: December 29, 1993

David H. Coar, U.S. Bankruptcy Judge

RULE 52. FINDINGS BY THE COURT; JUDGMENT ON PARTIAL FINDINGS

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 29, 1996

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. John L. Coffey, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

Nos. 94-3521 & 94-3574

IN THE MATTER OF
MOUNT CALVARY BAPTIST CHURCH
also known as
MOUNT CALVARY CHURCH & SCHOOL,

Debtor,

CHURCH MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee,

v.

MOUNT CALVARY BAPTIST CHURCH
also known as MOUNT CALVARY CHURCH
& SCHOOL and SEAWAY NATIONAL BANK,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94-C-673—Ann Claire Williams, Judge.

ORDER

On November 27, 1995, the Church Mutual Insurance Company filed a petition for rehearing with suggestion

for rehearing en banc. All the Judges on the original panel have voted to deny with petition, and none of the active Judges have requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

March 21, 1996

Mr. William J. Anaya
Johnson & Bell, Ltd.
222 North LaSalle St., #2200
Chicago, IL 60601

Re: Church Mutual Insurance Company
v. Mount Calvary Baptist Church, et al.
Application No. A-789

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on March 21, 1996, extended the time to and including May 31, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

Melissa A. Blalock
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

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Thomas F. Strubbe
United States Court of Appeals
for the Seventh Circuit
219 S. Dearborn Street
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